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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 230

SAMUEL H. MOSS, INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION.

PETITION FOR REHEARING

HENRY WARD BEER,
Counsel for Petitioner.

INDEX

SUBJECT INDEX

	Page
Petition for rehearing	1
Summary statement	3
Argument	2
I. The Solicitor General's admission that the lower court erred warrants certiorari	5
II. The Circuit Court's conceded error established that petitioner has had no day in court on sufficiency of Commission's evidence. The lower Court never passed on evidence before it	5
III. The lower Court's opinion cannot be left unreviewed; its error must be proclaimed	9
IV. Section 2(a) of the Clayton Act as here interpreted is unconstitutional—does not foster, but is purposed to destroy competition	10
V. Section 2 (b) of the Clayton Act violates the due process clause (Fifth Amendment) of the Constitution	13
VI. Lower Court's opinion on meeting competition confusing and unintelligible; offers no guide to American business; review imperative	16
VII. The Solicitor General's statement that the *Staley* and *Corn Products* opinions settled the question of price discrimination presented in the instant case is erroneous and may have unfairly influenced this Court to deny certiorari	18

Page

VIII. This Court apparently overlooked fact that in five of the eight instances of discrimination, stamps were sold by sealed secret competitive bids. Lower Court's decision and denial of certiorari doom competitive bidding 21

IX. Lower Court's approval of Commission's refusal to permit proof of meeting competition constitutes serious error. It is also contrary to direction found in this Court's opinion in *Staley* case 22

Conclusion 24

TABLE OF CASES CITED

A. L. A. Schechter Poultry Corp. v. *U. S.*, 295 U. S. 495 14

Corn Proucts Refining Co. v. *Federal Trade Commission*, No. 680 October Term, 1944, decided April 23, 1945 4

Federal Trade Commission v. *American Tobacco Co.*, 264 U. S. 298 10

Federal Trade Commission v. *Sinclair Refining*, 261 U. S. 476 14

Federal Trade Commission v. *Staley Mfg. Co.*, No. 559, October Term, 1944, decided April 23, 1945 ... 4

Hipolite Egg Co. v. *U. S.*, 220 U. S. 45 12

Montgomery Ward & Co. v. *N. L. R. B.*, 103 F. (2d) 147 24

Morgan v. *U. S.*, 304 U. S. 1 24

Shields v. *Utah, Idaho Central R. Co.*, 305 U. S. 177 .. 24

United States v. *Carver*, 260 U. S. 482 9

Virginia v. *Tennessee*, 148 U. S. 503 12

STATUTES CITED

Clayton Act, Section 2(a) 2, 3, 6, 8, 10, 11

Clayton Act, Section 2(b) 2,3, 14, 21, 22, 23

McLaughlin "The Court and the Robinson Patman Act, 4 Law & Contemporary Problems, 410 12

Robinson Patman Act 10

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Now comes the above named petitioner, Samuel H. Moss, Inc., and respectfully presents this, its petition and prays for a rehearing of its petition for a Writ of Certiorari herein and in support thereof shows:

The petition for Writ of Certiorari, filed July 14, 1945, was denied October 8, 1945.

Petitioner submits that in denying the petition for Writ of Certiorari, the Court has apparently overlooked a number of tremendously and vitally important questions that are here involved. Of such great moment are these questions that if the opinion and decision of the Court below remain unreviewed and unreversed, it may truly be said that the competitive system of the country, as we have known it, will actually cease to exist.

The denial of the Writ is detrimental not only to petitioner but to all other merchants in the United States subject to the Clayton Act as amended by the Robinson Patman Act, all of whom have a very important stake in the outcome of this proceeding.

Summary of Matters Apparently Overlooked by Court

1. The admission by the Solicitor General (in his brief in opposition to the granting of certiorari) that the Court below erred in arriving at its conclusion, *per se*, warrants Certiorari.

2. The lower court's conceded error establishes that petitioner has had no judicial review of the sufficiency of the evidence to support the Commission's findings of injury to competition upon which its order must be based.

3. The lower court's opinion cannot be left unreviewed in its present state for it can only serve to confuse rather than guide American business.

4. Section 2(a) of the Clayton Act, as here interpreted, is unconstitutional for it makes of the statute an instrument to destroy competition. As interpreted, the practices prohibited are in no wise inimical to competition or interstate commerce and consequently Section 2(a) is not within the authority of Congress under the commerce clause of the Constitution.

5. Section 2(b) of the Clayton Act, insofar as it refers to the justification of price discrimination "by showing that his lower price * * * was made in *good faith* to meet *an equally low* price of a competitor," is violative of the *due process* clause of the Constitution because this provision of the statute places an impossible burden upon the seller, is impractical, unworkable, unrealistic, naive and absurd. The statute offers absolutely no guide to

enable the seller to know, in advance of the sale, whether he will be deemed to have acted in "good faith" so as to be free of prosecution.

6. The lower court's opinion on the question of meeting competition under Section 2(b) is so confusing as to offer no directives whatever to American business seeking to comply with the law.

7. The Solicitor General's statement that the *Staley* and *Corn Products* opinions settled the question of price discrimination presented in the instant case is erroneous and may have unfairly influenced the Court to deny Certiorari.

8. This Court apparently overlooked the fact that in five of eight instances of discrimination, stamps were sold by sealed, secret competitive bids. The lower Court's decision and this Court's denial of certiorari doom competitive bidding.

9. The lower court's opinion upholding the Commission's refusal to permit petitioner to prove its defense of meeting competition has worked a serious miscarriage of justice and amounts to a denial of due process of law which this Court should rectify.

Summary Statement

The Circuit Court of Appeals affirmed the Commission's order directing petitioner, a rubber stamp manufacturer, to cease and desist from discriminating in price among its customers in violation of Section 2(a) of the Clayton Act, on the following grounds:

(a) That the Commission having proved that Moss sold rubber stamps to eight customers at different prices, and Moss having failed to prove affirmatively that it did not as a result thereof "lessen competition or tend to prevent it,"

the court held the Commission's findings of lessening of competition were "supported by evidence."

(b) The lower Court then held that Moss had failed to justify the discrimination because it did not show that the lower prices did not undercut its competitors' price and did "not prove that in any of the instances its prices were no lower than that of its competitors."

(c) Finally the Circuit Court decided that the trial examiner's exclusion of testimony whereby Moss sought to prove that in *all* of the instances its prices were no lower than its competitors, while unnecessarily strict, was proper because "it chances that no injustice was done."

The Solicitor General in his brief in opposition to certiorari, conceded that the lower court's principal ground for sustaining the Commission's order, i. e., that Moss had failed to prove affirmatively that it did not lessen or tend to prevent competition, was *completely erroneous.* Nevertheless, in the face of this admission, he argued that the order was rightly affirmed because *he* said that the Commission has proved that the discriminations lessened competition.

It was also stated in the Solicitor's brief that even if the lower court was equally wrong on its other ground, that the justification of meeting competition had not been made out, still certiorari was unnecessary because of this Court's decisions on this question in the cases of *Federal Trade Commission* v. *Staley Mfg. Co.,* No. 559, October Term, 1944 (decided April 23, 1945), and in *Corn Products Refining Co.* v. *Federal Trade Commission,* No. 680, October Term 1944 (decided April 23, 1945).

In the Solicitor's opinion, too, the exclusion of evidence was properly ruled to be irrelevant; in any case, said he, it is a purely evidentiary ruling.

I

The Solicitor General's Admission That the Lower Court Erred Warrants Certiorari

The brief of the Solicitor General, filed on behalf of the Federal Trade Commission in opposition to the petition for a Writ of Certiorari, demonstrated that petitioner's application was well founded. He there admits (pp. 7-9) that the opinion of the lower court was erroneous and that said court's principal basis for its decision was unfounded. As we have shown, the lower court's reason for affirming the Commission's order was that Moss had failed to prove affirmatively that it did not lessen or tend to prevent competition. The Solicitor agrees that this was error and admits that the "Commission has always construed the Act to require it as part of its affirmative case to present evidence that a discrimination may lessen or tend to injure competition." Since therefore it is agreed that the basic reason given by the lower court for affirming the order was in error, it is submitted that certiorari should have been granted so that a proper judicial determination may be had.

II

The Circuit Court's Conceded Error Established That Petitioner Has Had No Day in Court on Sufficiency of Commission's Evidence. The Lower Court Never Passed On Evidence Before It.

Despite the Solicitor General's admission of serious error on the part of the lower court, he opposed the granting of certiorari because *he said,* although without any evidence to support him, that the Federal Trade Commission had proved that the discriminations in the instant stamp case

"may lessen or tend to injure competition." After making the admission of error, he further argues that since the result reached by the Circuit Court, viz. the affirmance of the order to cease and desist, was right "under the construction of the statute urged by petitioner and applied by the Commission (and) there is no occasion for further review in order to determine what in this case is an academic question." In other words, the government is saying that despite the fatal error and false reasoning employed by the court below, yet no review should be permitted petitioner because *in the Solicitor's opinion*, the result in favor of the Commission was correct.

The Solicitor General's contentions are so demonstrably superficial and specious, they should not be permitted to defeat certiorari.

The opinion of the lower court makes it very evident that petitioner has never had its day in court on the most important question in the case, namely: Did the Commission sustain the burden it admittedly has of proving as required by Section 2(a) of the Clayton Act, that the effect of the eight instances of discrimination "may be substantially to lessen competition or tend to create a monopoly or to injure, destroy or prevent competition with" petitioner.

The Solicitor General informed this Court in his brief that the Commission had sustained this burden and had proved that the discriminations "may lessen or tend to injure competition." But this is merely a gratuitous and self-serving statement on his part, which was not decided by the Circuit Court of Appeals, as the opinion shows. This Court's denial of Certiorari, based presumably upon its acceptance at face value of the Solicitor General's assertion that the Commission had actually proved its case, would seem to disregard the injustice which has here been meted out to petitioner.

The erroneous reasoning of the Circuit Court inevitably resulted in that court's circumvention of the all important question of the sufficiency of the Commission's evidence. That court held that upon proof (by stipulation) that petitioner in eight instances, sold rubber stamps at different prices, the burden was upon it to prove "affirmatively that the discrimination did not lessen competition or tend to prevent it."

It is now conceded by the Solicitor General that the court was utterly wrong on the question of proof. Yet that error led it on to a more fundamental error which this court has overlooked. It was because the Circuit Court erroneously believed that petitioner had not sustained its burden that they held that the Commission's findings that the discrimination "had a tendency to induce the purchase of (Moss') rubber stamps by various users thereof and have tended to and do divert trade to (Moss) from its competitors" was "supported by evidence." *The lower court made no appraisal of the evidence* to determine whether the findings were supported by the evidence because under their mistaken theory the Commission's proof as to the effect of the discrimination was unessential.

Thus it is incontrovertible that the Circuit Court held that the findings were supported not by the Commission's proof but rather on that court's admittedly erroneous premise that petitioner had failed in its proof. Consequently the Solicitor General's contention in his brief to the Court that the Commission had proved the effect of the discrimination as required by the statute is merely an expression of his own opinion, which should not have influenced this Court in arriving at its decision denying certiorari. This Court ought not accept the Commission's self serving statement that it has proved its case as equal to and the equivalent of actual *proof* that it has proved its case.

Had the court below not erred, as it concededly did, petitioner would have obtained a decision on the indispensable issue as to whether the Commission's proof was sufficient to sustain its findings and order. This petitioner did not get, although in fairness and justice it was and is entitled to, such a judicial determination. *No court has as yet decided that the Commission's evidence in this case satisfies the statutory requirements under Section 2(a) of the Clayton Act as to the effect of the discrimination.*

The effect of this particular error on the part of the lower court, obviously is to deny to petitioner his day in court on the mere "ipse dixit" of the spokesman for an administrative agency whose order cannot under the circumstances of this case be said to have been subjected to judicial review.

This Court's denial of the petition serves to perpetuate the injustice to petitioner which should be remedied either by this Court's review of the evidence or by the remand of the case to the court below so that that court can make its determination on the evidence in this record.

The Solicitor General's admission in his brief that the lower court erred in this respect, and this Court's denial of certiorari, have now produced an anomalous and incongruous result, of which the petitioner is the victim. Although the lower court, in arriving at its conclusion, based it on a false premise, the Commission's evidence, consideration of which was not necessary under that false premise, is nonetheless now to be considered as sufficient to sustain its order on the Commission's own biased statement that it is sufficient. Here we have a startling innovation in judicial review of administrative orders.

The denial to petitioner of a judicial review of the sufficiency of the Commission's evidence is of such great importance to petitioner and to all American buyers and

sellers that this Court should reconsider its previous denial of certiorari and grant the writ so that the fundamental principle of judicial review may be preserved.

III

The Lower Court's Opinion Cannot Be Left Unreviewed: Its Error Must Be Proclaimed

This Court has apparently overlooked the fact that the opinion of the court below now stands as a precedent to other courts and American business with respect to the burden of proof under the Clayton Act as amended by the Robinson Patman Act. Despite the Solicitor General's admission in his brief that the court below erred on the question of the burden of proof, this Court's denial of certiorari leaves the lower court's opinion untouched.

This Court has often said that its denial of certiorari is not to be taken as a decision in favor of or against the decision below. "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times" (*United States* v. *Carver*, 260 U. S. 482, 490).

Thus the opinion of the lower court remains as a precedent and supposedly a guide to American business, the Solicitor General's admission of error notwithstanding. Furthermore, the Solicitor General's admission of error is not necessarily binding on the Commission in future cases. The Commission may with impunity decide at a later date that it suits its purposes to follow the lower court's reasoning. There will be no expression of disapproval of the lower court's opinion on the books to stand in its way; nor will there be a decision of the Supreme Court proclaiming to American business that the Circuit Court erred when it ruled that the person accused of discrimina-

tion must prove affirmatively that he did not lessen competition.

This is a serious matter for the Court to consider, because we are dealing with a much invoked statute of vital consequence to American business and with a Commission which has been accused by this Court on occasion of sweeping "all our traditions into the fire" (*Federal Trade Commission* v. *American Tobacco Co.* 264 U. S. 298, 305).

IV

Section 2 (a) of the Clayton Act as Here Interpreted Is Unconstitutional—Does Not Foster, But Is Purposed to Destroy Competition.

Petitioner further submits that certiorari should have been granted because there is here involved the question of whether Section 2(a) of the Clayton Act, as interpreted by the Commission, is constitutional.

Prior to the amendment of the Clayton Act, the section prohibited price discrimination where the effect may be:

(a) "substantially to lessen competition" or

(b) "tend to create a monopoly."

The Robinson Patman Act of June 19, 1936 added a new "effect" clause making unlawful a price discrimination where the effect may be:

> "to injure, destroy or prevent competition with any person who grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

It is obvious that the case at hand does not fit under the so-called "old effect" clauses. Since there was no attempt to prove the state of competition within the industry —indeed competitive conditions were held by the Commis-

sion to be irrelevant (R. 858-874, 888-899) it can hardly be said that petitioner, a single stamp manufacturer, among thousands throughout the country, substantially lessened competition. Certainly petitioner's practices did not and could not possibly tend to create a monopoly! The only other statutory basis, therefore, upon which the order can be founded must be the "new effect" clause. This clause has not been judicially defined although American business is in the direct need of some definiteness on this score.

The Commission and the Solicitor General are of the opinion that the loss of a single sale of one rubber stamp (referred to for purposes of prosecution as a "diversion" of a sale) is sufficient to satisfy the statutory requirement of "injury." Petitioner asserts that if the "new effect" clause can be satisfied by showing that a competitor lost one sale because of the accused's lower price, then such interpretation takes the section outside the power of Congress under the commerce clause. The section cannot be deemed to be a regulation of commerce if the every day gain and loss of sales in the course of competition all over the United States can be an "injury" rendering the winner of the sale a violator of Section 2(a) of the Clayton Act, subject to a fine for contempt if repeated after an order has been affirmed.

Unless the prohibition of the statute is limited to the prevention of acts having some inimical effect upon interstate commerce, Congress would be without power to prohibit the acts as regulations of such commerce. Where the acts are declared to be illegal under this power, there must be some reasonable relation between the end sought to be attained and the prohibited means or the statute will fall. The congressional power to regulate commerce includes the power to prohibit but only where such prohibition is in aid

of the lawful protection of the public. (*cf. Hipolite Egg Co. v. United States,* 220 U. S. 45.)

Where in the Commission's interpretation of Section 2(a) is there anything in the public interest? Is the public helped by the absence of competition? The many statutes enacted to help keep competition free and unfettered demonstrate that the credo of America is competition and not the restraint of competition.

The "new effect" clause can, it is submitted, be interpreted in such a way as to be consonant with Congressional power and with the existing anti-trust and trade restraint laws, only if the indefinite word "injury" is construed to mean something akin to what the other two definite words in the series, "destroy" and "prevent" mean.

In the series of words used in the "new effect" clause, "to injure, destroy or prevent competition", "destroy" and "prevent" are definite. Where competition has been either destroyed or prevented the result is the same for there is then no competition. The word "injure" however, is wholly indefinite and covers an enormous range, from the lowest degree of harm to virtual destruction. It is a well settled and familiar rule in statutory construction, exemplified by the maxim "*noscitur a sociis*", that in such cases where "any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words." (*Virginia* v. *Tennessee,* 148 U. S. 503, 519.)

So applied, the word "injure" as used in the "new effect" clause must be held to mean a very substantial injury amounting virtually to destruction of competition. (See McLaughlin, "The Courts and the Robinson Patman Act." 4 Law & Contemporary Problems, 410, 414-415.) That is the only requirement which would be in the public

interest. Clearly the loss of one or a few orders—all that is here present—would not satisfy such requirement.

The same result would be accomplished by applying the proper rules of grammar and modifying the "new effect" clause by the word "substantially" that appears in the first clause.

To assert that the "diversion" of a single sale is compliance with the required effect under the amended section is to make that section unconstitutional as outside the power of Congress.

The question of the constitutionality of this "new effect" clause has not been raised in any other case but it is so very important and novel to all American business as to warrant, in and of itself, the granting of certiorari by this Court.

V

Section 2 (b) of the Clayton Act Violates the Due Process Clause (Fifth Amendment) of the Constitution

This case also involves the very serious question of whether Section 2 (b) which allows an accused to justify his discrimination if he can prove that

> "his lower price * * * was made in good faith to meet an equally low price of a competitor."

is a deprivation of liberty and property "without due process of law" in violation of the Fifth Amendment of the Constitution.

The amended section in compelling a person to *meet* a competitor's price and *not to beat it*, has enacted a law which promotes price fixing in its worst form rather than competition. In addition it is utterly impractical and absurd. American business has never been carried on that

way and never will be unless our form of government is destroyed.

The very life blood of our economy is competition and not its antithesis. The Clayton Act has been on the statute books since 1914 and it has been said of that statute that its great purpose was

> "to advance the public interest by securing fair opportunity for the play of contending forces ordinarily engendered by an honest desire for gain."
>
> (*Federal Trade Commission* v. *Sinclair Refining*, 261 U. S. 476.)

The amendment of Section 2 (b) effected by the Robinson Patman Act in June, 1936, abandons the very purpose of the statute. How can competition exist if a merchant cannot offer to undersell his competitor but can only meet his price. Can Congress destroy competition and pass a price-fixing law in the guise of an anti-discrimination statute? It seems to petitioner that such a question is merely rhetorical, the answer being so obviously no. Yet that is exactly what Congress has done in amending Section 2 of the Clayton Act.

Section 2 (b) also refers to fixing of a lower price in "good faith" to meet an equally low price. There is contained in the statute no definition of good faith, no standards by which this conduct can be gauged. A violation of a statute cannot constitutionally be made to depend on such an immeasurable, vague and uncertain standard. (*Cf. A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 531, 552.)

It has been held that the good faith requirement in Section 2(b) compels the seller to "investigate or verify" statements made by his buyer of competitors' prices. So interpreted, Section 2(b) stands as an unconstitutional challenge and defiance to the business methods pursued for

generations in the United States, where sales of merchandise have always been made to buyers on the assumption that the buyers and sellers are honest men.

It is outside the powers of Congress for it to legislate into the laws of trade of this country, a presumption that whenever a buyer informs a seller that he can buy for less, the buyer is *per se* a liar whose statement must be investigated by the seller. Furthermore, under such an interpretation, the seller would have to advise the proposed buyer that he must investigate his statement before he can make a sale to him, and to that end and purpose he must demand of the buyer, the name and address of the one who the buyer claimed would sell to him for less, before he can make a sale.

It would appear that to satisfy the statute, the seller must inquire of his competitors the prices at which they have agreed to sell the product and that he must inform his competitor that he intends to compete with him for the business. Of course, if the customer refuses to give the seller the name of the competitor, he must abandon all attempts to sell to this particular customer. If the customer gives him the competitor's name and if the seller finds out the competitor's price and he charges the same price, then he would be violating the Sherman Act, for he would be guilty of an agreement to fix prices to that particular customer.

Moreover, in the face of such insult and challenge to the buyer's integrity, can it be held that Congress intended that the buyers would be callous enough to give an order to a seller who demands such an investigation. It would seem to need no argument for the statement that the buyers of our country would not only refuse to buy from such an insulting seller, but would brand him as a person unfit to do business.

The foregoing, it is submitted, exposes the fact that this Court has apparently overlooked the serious constitutional question which is here involved.

VI

Lower Court's Opinion on Meeting Competition Confusing and Unintelligible; Offers No Guide to American Business Review Imperative.

The Court should feel obliged to grant certiorari for yet another reason. The lower court's opinion dealing with the statutory justification of price discrimination where it is claimed that the lower price was fixed in good faith to meet the equally low price of a competitor is so confusing, equivocal and ambiguous as to make it impossible for American business to understand its obligations under the amended Clayton Act.

Since this statute in many respects controls the conduct of all merchants doing business in interstate commerce, a court called upon to interpret it should advise the merchant what is or is not a violation of the statute. This is especially necessary where, as here, violations of an affirmed order issued under the statute can be punished as contempts.

How can a merchant know when he can in "good faith" lower his price. Neither the statute nor the lower court's opinion offers him any guide or method by which he can determine in advance whether he will be violating the law. For example, the lower court in its opinion wrote:

> "We agree that he must not undercut his competitors' price; but whether it is a condition upon the defense that he must know what that price is, is another question which we reserve. If in fact he does not undercut his competitors' price, *perhaps* he may escape, even though he does not know what that price is, though it is

> only by chance that he has not undercut it. That is to say, we need not now decide whether the phrase 'in good faith' means more than that the offer shall be made with actual intent to sell at the price named."

Such language would seem to disregard the penalties that may result from the disobedience of the statute and any order issued thereunder!

One would suppose that if the lower price did not undercut his competitors' price that the price discrimination would have had no effect on the competitor or competition and consequently that no violation would exist. Yet the court below says that in such a case "perhaps he may escape." What that means is incomprehensible and leaves American business no safeguards at all against the pitfalls of this drastic statute.

Further, the Circuit Court says that "good faith" means only that the seller must actually intend to sell at the price named. Since presumably the sale at the lower price took place—else Section 2(a) does not apply at all for there must actually be two *sales*, one at a lower and one at a higher price—the court's reference to the intention to sell at the quoted price is meaningless.

The Solicitor General himself tried to make sense out of this part of the lower court's opinion and decided to give up. For he stated in his brief that even if the lower court's reasoning was wrong, the question of good faith and meeting an equally lower price of a competitor had been discussed by this court in the *Staley* and *Corn Products* cases. Thus he wrote (p. 10):

> "Insofar as the *ratio decidendi* of the lower court differs from the foregoing later decisions by this Court (the Staley and Corn Products cases) the latter will be a guide to the court below in future cases involving defenses under Section 2(b)."

It should not be overlooked that the *Staley* and *Corn Products* cases deal not with ordinary instances of sales at different prices but with an unlawful basing point system of prices using phantom freights. Merchants who do not employ basing points and phantom freights should not be relegated to this court's opinions in those cases. This court there directed itself to a system that could operate only in violation of law. For inevitably some purchasers had to pay for freight they did not incur while others who incurred freight charges did not pay for them.

Here we have an ordinary merchant trying to sell his wares at such prices as he could get. If a buyer tells him a competitor has offered to sell at a lower price, the merchant cannot investigate the truth of that statement, he cannot appear naive enough to assume that he can question the buyer's veracity and still get an order. He must either offer to sell at a lower price or lose the order. If he gets the order, has he fixed his lower price in good faith? Certainly the lower court here has not answered this question though it was before it; nor, is it submitted, was it decided insofar as the ordinary merchant is concerned by this court in the basing point cases.

The lower court's opinion in this respect must not be allowed to stand unreviewed. Certiorari should be granted.

VII

The Solicitor General's Statement That The Staley and Corn Products Opinions Settled the Question of Price Discrimination Presented in the Instant Case Is Erroneous and May Have Unfairly Influenced This Court to Deny Certiorari.

The Solicitor General, at pages 9 and 10 of his brief, erroneously informed this Court that its opinions in the cases of *Federal Trade Commission* v. *Staley Manufactur-*

ing Co. and *Corn Products Refining Company* v. *Federal Trade Commission,* settled the question of competitive price discrimination involved in the instant case. The questions here concerned could not have been settled or even passed on in those cases for the unlawful method of selling the product there involved is absolutely foreign to the ordinary every-day sales practices involved in the instant stamp case.

In the *Staley* and *Corn Products* cases, there was involved the notoriously illegal phantom freight basing point system of selling which was directly aimed at the elimination of competition among buyers of a basic raw product, i.e., glucose, used in the manufacture of candy, and the illegal system was purposely designed to favor one buyer over another by reason of unearned preferential freight rates. The sub-headings in this Court's opinion in the *Corn Products* case, shows how completely different are the questions that were involved in the *Staley* and *Corn Products* cases, and in the instant case of the little manufacturer of made to order rubber stamps in a highly competitive industry where no monopolistic practices are present.

(1) "Basing Point Practices." No such practices were or could have been present in the instant case. Glucose is like coal and iron—a raw product. Little made to order rubber stamps are entirely different. They are not sold in car load lots at prices determined by freight basing points. As a matter of fact, some orders for stamps are as low as 75¢ for a complete order.

(2) "Booking practices." Glucose orders are booked in advance by options, etc. Under this practice some customers buying in tank wagon lots are favored, etc. etc. No such practice is or could be present in the sale of made to order rubber stamps.

(3) "Discounts to Purchasers of By-products." No by-products are involved in the sale of the little made to order rubber stamps.

(4) "Advertising Allowances" to favored customers. Such practices are not present in the made to order rubber stamp business.

In the *Staley* case it was held that there existed a slavish following of a pricing policy of systematic discriminations, and that it could not be said that the price discriminations resulted, as here in the instant case, in *lower* prices to meet equally low prices of a competitor.

In that case, too, the Court referred to the artificially high prices from the use of the basing point system. In the instant case there never were any artificially high prices. Every price charged by petitioner was an actual competitive price in a highly competitive business. The state of competition within the industry by its very nature, belies a monopoly or substantial lessening or destruction of competition.

This Court in its opinion in the *Staley* case also said that the statute "places emphasis on individual competitive situations." Consequently there can be no comparison between the situation where raw glucose in carload lots are sold on a basis of phantom freights and basing points and the sale of made to order rubber stamps.

This Court's opinions in the *Staley* and *Corn Products* cases dealing with the monopolistic and reprehensible pricing system and other untoward practices detrimental to the American system, furnish absolutely no assistance to the makers of made to order rubber stamps on how to obey this most drastic statute.

VIII

This Court Apparently Overlooked Fact That in Five of the Eight Instances of Discrimination, Stamps Were Sold by Sealed Secret Competitive Bids. Lower Court's Decision and Denial of Certiorari Doom Competitive Bidding.

It is not asserted that the lower court by its decision and this Court, by its denial of certiorari, intended to eliminate competitive bidding. But that is the result. The court will take judicial notice that the purchase of many articles of commerce are accomplished by a buyer calling for sealed secret competitive bids, the sale going to the lowest bidder. Indeed by statute, the federal government as well as states and cities, must purchase all their requirements in that fashion.

Ordinarily where the bidding is not collusive, a seller is unaware of his competitors' prices; he knows only that he will be competing with his competitors and will get the sale if his price is lowest. He cannot ask his prospective buyer for competitors' prices and certainly he cannot investigate or verify his competitors' prices. Moreover, unless he would violate the Sherman Act, he cannot inquire of his competitors for their prices and fix his price so as to meet their prices.

How then, can an honest and law abiding seller ever justify, under Section 2(b) of the Clayton Act, a lower price submitted in the form of a sealed, secret competitive bid? A seller who submits a lower price in anticipation of aggressive competition, will, if his price happens to undercut a competitor's price, be guilty of violating the Clayton Act. If his price meets that of his competitors he can be accused of violating the Sherman Act. Americans cannot do business on such a basis.

The Solicitor General, by a footnote to page 10 of his brief, says that the discussion of sealed bids is not here presented because petitioner offered such proof "as to only one of the numerous instances of discriminatory prices shown by the evidence." Such a statement is not correct. In the first place, there were not "numerous instances of discriminatory prices" but only *eight* solitary instances thereof. Secondly, there was proof offered that in five of those eight instances, the customers were sold on sealed bids (R. 1012, 1013).

The question of competitive bidding is of serious consequence in this case. A determination of this Court on this question of the effect of Section 2(b) of the Clayton Act on competitive bidding is furthermore of the utmost consequence to that great portion of American business who buy and sell by sealed, secret competitive bids.

IX

Lower Court's Approval of Commission's Refusal to Permit Proof of Meeting Competition Constitutes Serious Error. It Is Also Contrary to Direction Found in This Court's Opinion in Staley Case.

The Solicitor General in his brief casts aside petitioner's argument as to the Commission's exclusion of vital testimony as purely an evidentiary matter not warranting certiorari.

Petitioner tried very hard by its offer of proof to show that competitors offered to sell stamps at lower prices to the eight customers listed in the stipulation. The Commission's trial examiner excluded such testimony on the ground that the existence of competition was *irrelevant* (R. 890-899). In so doing he kept tight shut the mouths of the witnesses from whom the necessary evidence may have come.

The Circuit Court said the Commission should *not* have excluded the evidence but that it chanced that "no injustice" was done because, said that court, petitioner was not prepared to prove that its prices were no lower than its competitors. In saying this the lower court disregarded the facts that petitioner was stopped at the very threshold of his questioning, that petitioner's first step in that proof was to show that its competitors solicited sales from the eight companies referred to in the stipulation. The lower court erred grievously when it assumed that petitioner could not prove what it was given no opportunity to prove.

The question here involved is more than purely an evidentiary matter, as the Solicitor General phrases it. It concerns the absolute denial by a subordinate administrative agency of the right afforded by the statute to an accused company to prove its defense. Section 2(b) says specifically:

> "That *nothing* herein contained *shall prevent* a seller rebutting the prima facie case thus made by showing that his lower price * * * was made in good faith to meet an equally low price of a competitor."

This Court also declared in the *Staley* case that this statutory defense is "a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination." In view of this statement it would appear to have been a serious oversight for this Court to deny certiorari and thus allow to stand the lower court's opinion which approved the Commission's failure to permit petitioner to present its evidence of this defense.

This Court said in the *Staley* case that "Congress has left to the Commission the determination of fact in each case whether the person charged with making discriminatory prices acted in good faith to meet a competitor's equally low prices. The determination of this fact from

the evidence is for the Commission." Yet in the instant case, by its denial of certiorari, the Court has permitted the Commission to exclude the very evidence which may deny to it the right to exercise its authority over the merchant so accused.

The examiner's exclusion of the very important evidence tending to prove the statutory defense, which was criticized but approved by the lower court, is of the utmost importance to every merchant engaged in interstate commerce. Administrative agencies have become so large a part of a merchant's commercial existence that the courts must be ever on the alert to limit its action to lawful channels.

The failure of an administrative agency to permit a party haled before it to prove a statutory defense is so serious a matter that such conduct may amount to a denial to it of a fair trial and consequently a deprivation of petitioner's liberty and property without due process of law. (*Morgan* v. *United States*, 304 U. S. 1; *Shields* v. *Utah, Idaho Central R. Co.*, 305 U. S. 177; *Montgomery Ward & Co.* v. *N. L. R. B.*, 103 F. (2) 147).

This Court's intervention herein by granting certiorari and reversing the lower court's approval of the exclusion of the evidence would give petitioner the opportunity to prove the defense which under the statute he must be permitted to do, and and would also have a most salutary effect on the conduct of administrative agencies.

Conclusion

It can be accurately said that the Solicitor General's admission, that the lower court's bases for its affirmance of the Commission's order were erroneous, emphasizes that petitioner has been deprived of its day in court. For that reason as well as the constitutional and other most impor-

tant and vital grounds set forth herein, this court should have granted certiorari and should now do so.

Petitioner submits that the extraordinary situation here involved entitles this case to this Court's review and opinion.

Respectfully submitted,

HENRY WARD BEER,
Counsel for Petitioner,
Samuel H. Moss, Inc.

I, Henry Ward Beer, counsel for the above named petitioner, do hereby certify that the foregoing petition for rehearing in this cause is presented in good faith and not for delay.

HENRY WARD BEER.